

## The State of South Carolina



## Office of the Attorney General

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May 11, 1987

The Honorable Addison G. Wilson  
Member, South Carolina Senate  
606 Gressette Building  
Columbia, South Carolina 29202

Dear Senator Wilson:

You have requested an opinion as to the applicability of the South Carolina Consolidated Procurement Code to the construction of the Koger Center by the Carolina Research and Development Foundation, Inc. (hereinafter sometimes "the Foundation"), and the subsequent lease back of the Koger Center to the University of South Carolina. It is our opinion that, under a strict reading of the law, the competitive purchasing provisions of the Procurement Code do not apply.

The Procurement Code provides by its own terms that "[t]his code shall apply to every expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of funds...." § 11-35-40(a), S.C. CODE, 1976 (as amended). A "governmental body" is further defined as "any state government department, commission, council, board, bureau, committee, institution, college, university, technical school, legislative body, agency, government corporation, or other establishment or official of the executive, judicial or legislative branches of this State. Governmental body excludes the General Assembly...." § 11-35-310(18), *supra*. We are advised that the Carolina Research and Development Foundation, Inc., is a privately chartered eleemosynary corporation. As such it does not fall within the comprehensive statutory definition of a governmental body as set out in the Procurement Code. Another similar type foundation has been held by the court to be legally distinct from the state institution for whose benefit it expended funds and therefore, by inference, it was not a governmental body. Citadel Development Foundation v. City of Greenville, 279 S.C. 443, 308 S.E. 2d 797 (S.C. App., 1983).

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A public policy argument may nonetheless be made that, when a private entity expends funds for the benefit of a governmental body, that the public bidding requirements of the Procurement Code should apply. We are sympathetic with that argument, but we are unable to construe the current provisions of the Procurement Code to reach that result. We would, however, strongly support legislation to bring those private foundations such as the Carolina Research and Development Foundation, Inc., under the public bidding requirements of the Procurement Code.

Secondly, you have asked whether the Procurement Code applies to the lease back of the Koger Center from the Foundation to the University of South Carolina. The Code, by its own terms, does not apply to a procurement of real property or an interest in real property other than leasehold interests. § 11-35-40(a); § 11-35-310 (8) and (28), supra. The provisions of the Code relating to leases of real property for governmental bodies, as promulgated by Regulation R19-445.2120, require that the governmental body obtain the written approval of the Division of General Services to enter into the lease agreement. § 11-35-1590, supra. Our information is that this written approval was obtained by the University from the Division of General Services in compliance with the Procurement Code. These provisions are consistent with the general weight of authority which exempts contracts for the lease or purchase of real property by a public body from otherwise applicable competitive bidding statutes. Libby v. City of Dillingham, 612 P. 2d 33, 45 (Alaska, 1980). (Concurring op.); Ambrozich v. Eveleth, 274 N.W. 635 (Minn., 1937); see Hickey v. Burke, 69 N.E. 2d 33 (Oh. App., 1946).<sup>1</sup>

You have also asked for an opinion regarding the legality of the sale of the Wade Hampton Hotel by the University. The Fifth Circuit Solicitor has recently concluded an investigation into this matter and found no violation of state law to have occurred. As we have previously advised, the determination of a circuit Solicitor, after investigation of a matter, that no laws have

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<sup>1</sup> The situation presented here is distinguished from that discussed in our earlier Opinion dated January 24, 1984. There, the institution in question would have been granting the exclusive use and enjoyment of a portion of its own property and the exclusive right to make a substantial profit from the development of that property. In this instance, however, it is our information that the real property being developed by the Foundation is not being conveyed by the University as part of the instant transaction, but rather has been held by the Foundation as private property. The fact that the Foundation may have agreed to convey that property to the University does not change its legal status as private property.

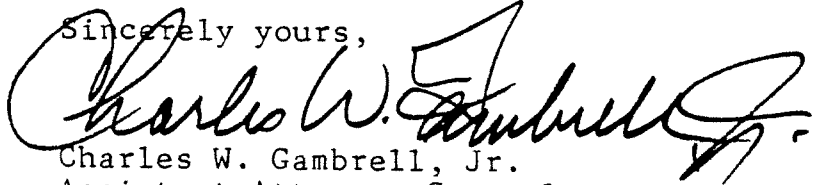
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been violated is generally controlling. Op. Atty. Gen., dated May 13, 1986. In our judgment, it would be inappropriate for this Office to inquire again into the same matter which has already been reviewed in detail by that public official in the performance of his official duties.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Charles W. Gambrell, Jr.", written in a cursive style.

Charles W. Gambrell, Jr.  
Assistant Attorney General

CWGjr/tgc